Care Manor of Farmington, Inc. *and* New England Health Care Employees Union, District 1199, AFL–CIO. Case 34–CA–6258

August 15, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On July 12, 1994, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief to the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The Respondent excepts to the extraordinary remedy awarded by the judge in which he ordered the Respondent to pay to the Board and the Union all costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this case. See *Heck's Inc*., 215 NLRB 765 (1974); *Tiidee Products*, 194 NLRB 1234, 1236–1237 (1972), enfd. as modified 502 F.2d 349 (D.C. Cir. 1974), cert. denied 421 U.S. 991 (1975). Contrary to our dissenting colleague, we agree with the judge that the remedy is appropriate in this case.

The Respondent flatly refused to bargain with the Union or respond to the Union's information requests for more than 4 months despite the Union's uncontested election victory[1] and the July 8[2] certification as the exclusive bargaining representative of the Respondent's employees. After the Union's two July requests to start contract negotiations and its request for information necessary for bargaining went unheeded, Union Vice President Allen personally met with Respondent's president, Konig, on August 2 and asked him when they could begin negotiations. Konig stated that he would not meet with the Union at that point because he had been notified by his attorney that another union was involved in the matter. Allen, however, correctly informed Konig that the Union had been certified by the Board and that the other union was no longer involved. Nevertheless, as the judge found:

> Konig said that it did not matter to him and that he was going to let things play out with the Labor Board and that he was not going to give the Union the information requested or meet with the Union.

The Respondent, thereafter, persisted in its refusal to bargain until November 12. Further, despite the Union's reiteration of its information request on October 19, the Respondent furnished the Union no information until November 15 and never furnished all the information requested.[3]

The Respondent's refusal to bargain with the Union and to provide information relevant to bargaining had no colorable basis. Unlike routine cases in which employers refuse to bargain with a newly certified union in order to gain court review of the union's certification, here the Respondent had filed no objections to the election. Nor did it allege any newly discovered evidence or special circumstances warranting reexamination of the Union's certification. Thus, the Respondent had no basis on which to challenge its obligation to bargain with the Union.[4] As the Supreme Court has stated:

> Upon certification by the NLRB as the exclusive bargaining agent for a unit of employees, a union enjoys an irrebuttable presumption of majority support for one year. . . . During that time, an employer's refusal to bargain with the union is *per se* an unfair labor practice . . . .[5]

That Allen personally informed Konig of the Union's certification and Konig responded that it ''did not matter'' underscore that the Respondent's continued refusal to bargain constituted nothing more than blatant defiance of its lawful obligation. The baselessness of the Respondent's refusal to bargain or provide information is further reflected in its failure at hearing to present any witnesses or raise any factual issues or issues turning on credibility. Contrary to our dissenting colleague, we find that the Respondent's ability at hearing to cross-examine the General Counsel's witnesses and raise irrelevant and spurious arguments fails to show that the Respondent's refusal to bargain or provide information was anything other than utterly without legal basis. That the Respondent ultimately ceased its refusal to bargain with the Union before the hearing began hardly erased its more than 4 months of unlawful conduct. An employer is not free to flout its bargaining obligation provided that it relents and begins bargaining before the resulting unfair labor practice complaint comes to hearing. The Respondent's defiance of its lawful obligation to bargain and its refusal to resolve the resulting unfair labor practice charges short of trial caused the Board and the Union to expend resources needlessly and burdened the Board's

[1] The tally was 53 votes for the Union, 1 for a different union, and 1 for neither.

[2] All dates are in 1993.

[3] The information sought was routine information relevant to bargaining, such as the employees' names, addresses, job classifications, and wage rates, and information about the Respondent's benefit plans and personnel policies.

[4] See Sec. 102.69(b) of the Board's Rules and Regulations.

[5] *NLRB v. Curtin Matheson Scientific, Inc*., 494 U.S. 775, 777–778 (1990) (citation omitted).

processes unnecessarily. Accordingly, for the foregoing reasons and those stated by the judge, we find entirely justified the judge's awarding of an extraordinary remedy requiring the Respondent to pay the Board and the Union all costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Care Manor of Farmington, Inc., Farmington, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER STEPHENS, dissenting in part.

Although I agree that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain and furnish information, I do not agree that those violations warrant the extraordinary remedy awarded by the administrative law judge. As the following review of the facts of the case reveals, the Respondent's conduct, although unlawful, was not so egregious, or its defenses so patently frivolous, as to require the Respondent to pay the litigation expenses incurred by the Board and the Union in prosecuting the case to a hearing. I, therefore, dissent from that portion of the decision.

The Respondent is one of a number of nursing homes owned by Michael Konig, many of which are subject to collective-bargaining agreements with the Charging Party Union. On June 29, 1993,[1] the Union won an election in a unit of nonprofessional employees at the Respondent's facility.[2] No objections were filed, and the Board certified the Union as the bargaining representative on July 8.

On July 1, prior to the Union's certification, the Union sent the Respondent a letter requesting bargaining and information in preparation for bargaining. On July 19, after the certification, the Union's vice president, Maryann Allen, asked the Respondent's counsel, Stuart Bochner, if he had seen the July 1 letter. Bochner replied that he had not, but that he would be talking to Konig, the Respondent's president, soon. Allen saw Bochner again about a week later in her office, and he once again promised to get back to her on the matter. Nothing had happened by August 2, when Allen encountered Konig, who told her in effect that because another union was ''involved in the matter'' he would not at that point meet with the Union or supply information.

In response to the Respondent's refusal, the Union proceeded along two tracks. It filed an unfair labor practice charge with the Board, but it also pursued another option available to it because of an agreement which Konig had entered into with the Union at other nursing homes at which the Union was the bargaining representative. Konig had previously agreed to interest arbitration for initial contracts, and his refusal to negotiate enabled the Union to submit all terms and conditions as matters in dispute to the American Arbitration Association under its Rules for Expedited Arbitration.

On October 19, pursuant to the interest arbitration procedure, Leslie Frane, a representative of the Union, sent the Respondent a letter requesting all the information originally sought, noting that this was the second request, and asking that it be supplied no later than November 1, so that the Union could prepare for the interest arbitration sessions scheduled for November 12 and 15. The Respondent did not provide any of the information until November 15, when some, but not all, was provided. Nonetheless, in the framework of the interest arbitration procedure, the parties managed to reach complete agreement on a collective-bargaining agreement at the November 15 session—a ''signed agreement'' according to Union Negotiator Frane.

I certainly agree that the Respondent's inexcusable foot dragging and failure to promptly supply requested relevant information violated Section 8(a)(5) of the Act. Hence, the Respondent was wrong in thinking that the preexisting interest arbitration arrangement and its achievement of a collective-bargaining agreement with the Union after two sessions would absolve it of all liability under the Act. But I disagree that, under all the circumstances, this is the sort of case for which the *Tiidee Products* litigation (194 NLRB 1234 (1972) enfd. as modified 502 F.2d 348 (D.C. Cir. 1974), cert. denied 421 U.S. 791 (1975)), costs remedy was designed.

As the judge correctly noted, the Board has assessed litigation expenses against a respondent when that respondent raises ''patently frivolous'' defenses to a charge that the respondent has refused to bargain.[8] I disagree, however, with the judge's finding, adopted by the majority, that the Respondent's failure to proffer any evidence at the hearing is ''indicative of the Respondent's willful use of meritless defenses to burden the processes of the Board'' and amounts to an admission that it violated the Act. Contrary to the judge's observation, the Respondent in fact defended against the complaint through cross-examination of the General Counsel's witnesses.[9] The Respondent brought out

[1] All dates are 1993 unless otherwise indicated.

[2] The tally of ballots showed 53 for the Union, 1 for Local 348-S of the United Food and Commercial Workers, and 1 for no union.

[3] See *Heck's Inc.*, 215 NLRB 765 (1974); and *Tiidee Products, Inc.*, supra.

[4] In its defense, a respondent may choose to attack the General Counsel's case through cross-examination of its witnesses, present witnesses of its own, or both. That the Respondent here chose to establish its defense through the cross-examination of the General Counsel's witnesses does not render the defense patently frivolous.

during cross-examination many of the facts set forth above: (1) that the Union sought arbitration in mid-August, a little more than 1 month following the certification of the Union; (2) that the Respondent did not object to or otherwise attempt to obstruct or delay the arbitration; and (3) that the Union and the Respondent reached agreement after 2 days of arbitration, without the production of all of the documents requested by the Union. Thus, the Respondent was able to argue (1) that Konig's statement on August 2 evidenced his misinformation, not an unequivocal refusal to bargain, and that the Union by invoking interest arbitration, did not take sufficient steps to clarify the misunderstanding; (2) that the Respondent's willingness and prompt participation in the arbitration belies its alleged bad faith; (3) that the Respondent's failure to furnish information was essentially de minimis, because the parties entered into a collective-bargaining agreement without the Union's having received the documents; and (4) that even if the Board concluded that the Respondent refused to bargain or provide information, that violation was of such short duration as to require no remedy.[5] Although we have found these defenses to be without merit, they are not patently frivolous.

In my view, the Respondent's conduct in this case does not approach the level of flagrant violation or frivolous defenses for which we have awarded litigation expenses in the past.[6] Therefore, I would not award litigation expenses to the Board and the Union as a remedy in this case.

[5] See, e.g., *NLRB v. Cauthorne Trucking*, 691 F.2d 1023, 1025–1026 (D.C. Cir. 1982) (a respondent may limit liability for a unilateral change violation by subsequently bargaining in good faith); *Steelworkers v. NLRB*, 496 F.2d 1342 (5th Cir. 1974) (although the respondent's claim of misrepresentation by union during election ''borders on the spurious,'' the defense is not so frivolous as to require assessment of litigation expenses).

[6] Compare *Harowe Servo Controls, Inc.*, 250 NLRB 958, 964–965 (1980) (following certification of the union, employer instituted several unilateral changes, including an across-the-board wage freeze for unit employees while increasing wages paid to other employees, arrived late to negotiating sessions, refused to provide information, attempted to deal directly with employees, and tendered subsequent bargaining proposals less favorable than previous proposals, unilaterally increased wages in excess of those offered in its last proposal, and unlawfully withdrew offers to unfair labor practice strikers upon termination of strike) with *Houston County Electric Cooperative*, 285 NLRB 1213 (1987) (no litigation expenses awarded despite finding that employer bargained in bad faith, made unilateral changes to terms and conditions of employment, and refused to reinstate unfair labor practice strikers).

Thomas W. Doerr, Esq., for the General Counsel.
Stuart Bochner, Esq., of South Orange, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based upon a charge filed by New England Health Care Employees Union, District 1199, AFL–CIO (the Union) on August 4, 1993,[1] the Regional Director for Region 34 issued a complaint and notice of hearing (complaint) on September 30, 1993. The complaint alleges that Care Manor of Farmington, Inc. (Care Manor or Respondent) has refused to bargain with the Union, and further, has failed and refused to provide to the Union information that is necessary and relevant to its role in representing a unit of Respondent's employees, and has thus violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent's answer to the complaint, inter alia, admits the jurisdictional allegations of the complaint as well as the labor organization status of the Union and the supervisory status of its president, Michael Konig.

Hearing was held in these matters in Hartford, Connecticut, on February 7, 1994. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

In its answer to the complaint, Respondent admitted the jurisdictional allegations. At all material times, Respondent, a Connecticut corporation with an office and place of business in Farmington, Connecticut, has been engaged in the operation of a nursing home. During the 12-month period ending August 31, 1993, Respondent, in conducting its business operations described above, derived gross revenues in excess of $100,000. During the same period, Respondent purchased and received at its facility goods valued in excess of $5000 directly from points outside the State of Connecticut. I, therefore, find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

II. THE INVOLVED LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts and the Issues for Determination*

Pursuant to a Board-conducted election, the Union was certified as the exclusive collective-bargaining representative of a unit of Respondent's employees on July 8, and since July 8, based on Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the unit. The following employees of Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[1] All dates are in 1993 unless otherwise noted.

> All full-time and regular part-time employees employed by the Employer at its Farmington, Connecticut facility, including licensed practical nurses, certified nurses aides, dietary employees, housekeeping employees, laundry employees, maintenance employees, recreation department employees, the secretary, the admissions coordinator, and clerical employees; but excluding the administrator, the director of nursing services, the assistant director of nursing services and registered nurses, and other supervisors and guards as defined in the Act.

The complaint alleges that:

1. About July 1, by letter, July 19, by telephone, July 28, and August 2, in person, the Union requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

2. Since about August 2, Respondent has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the unit.

3. About July 1, by letter, the Union requested that Respondent furnish the Union the following information:

> . . . [a] list of all employees, alphabetically by job classification, including their Social Security numbers, dates of hire, addresses, telephone numbers, birthdates, wage rates and hours worked per week. . . . [a]ll information regarding benefit plans offered (health, life tuition, etc.) and their costs both to you and to the employees. If you provide a pension, please give the total assets of the fund, all by-law and actuarial information and summary plan descriptions. In addition, we request a copy of your personnel policies and any other terms and/or conditions that affect employment.

4. The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

5. Since about August 2, Respondent has failed and refused to furnish the Union with the information requested by it as described above.

Respondent, through counsel, admitted at the hearing that Respondent did receive the Union's request to bargain and its information request. Union Vice President Maryann Allen testified that the Union sent Respondent a letter dated July 1 requesting bargaining, the information set out above, and asked that Respondent contact the Union's president, Jerome Brown, to set up dates for negotiations for a collective-bargaining agreement.

On July 19, Allen had a phone conversation with Respondent's attorney in which she asked the attorney to set up dates for negotiations. She asked the attorney if he had seen Brown's letter of July 1, and the attorney said he had not. The attorney indicated he would be speaking with Respondent's president, Konig, and the conversation ended.

In the last week of August, Respondent's attorney was in the Union's office on another matter pertaining to some other nursing homes that Konig owns whose employees are represented by the Union. Allen asked the attorney if he had spoken to Konig and was he prepared to negotiate and provide the requested information. The attorney said he would speak with Konig at the end of the week and would get back to Allen. The attorney indicated that he had seen Brown's letter of July 1 but had not yet spoken to Konig about the letter. The attorney did not get back to Allen about the matter.

On August 2, Allen met Konig at Bradley International Airport in Windsor Locks, Connecticut. They talked about Brown's letter and Allen asked when they could begin negotiations. Konig replied that he had had a discussion with his attorney and that he was informed that another union was involved in the matter and therefore he did not feel that at that point he would meet with the Union. Allen told him the Union had been certified by the Board and that the other union was out of it. Konig said that it did not matter to him and that he was going to let things play out with the Labor Board and that he was not going to give the Union the information requested or meet with the Union.

In contracts that the Union has with other of Konig's nursing homes is a provision that provides that when a newly organized facility is certified by the Board, the employer will meet with the Union and negotiate. This provision is subject to the arbitration provisions of the contracts. Pursuant to this provision, Allen sent a letter to the contractual arbitrator, the American Arbitration Association which reads as follows:

> Pursuant to the above captioned parties' written agreement, I am writing to submit a dispute over an initial collective bargaining agreement at Care Manor of Farmington for interest arbitration under AAA's Rules for Expedited Arbitration.
>
> Some background to this submission is necessary to avoid possible confusion. New England Health Care Employees Union, District 1199 is a party to numerous collective bargaining agreements with Connecticut nursing homes owned by Michael Konig. As part of a recent comprehensive settlement of successor contracts, the parties agreed to submit all unresolved terms of *initial* contracts for any newly organized bargaining units to AAA under its Rules for Expedited Arbitration.
>
> Please find enclosed the parties' agreement in this matter, and note especially numbered items 2 through 5, which specify parameters for the arbitrator on the economic and language terms for any initial contract.
>
> District 1199 was recently certified by the NLRB as the bargaining representative for a unit of professionals, clerical workers, and service and maintenance employees at Care Manor of Farmington. The employer has refused to negotiate with us pursuant to the terms of the enclosed agreement, so therefore, we are now submitting all matters in dispute for interest arbitration as indicated above.

Leslie Frane, a nursing home organizer for the Union, testified that she was assigned responsibility for Care Manor of Farmington in October. On October 19, she sent Respondent a letter requesting the same information requested in Brown's July 1 letter and further noting that this was the second request for the information. Frane requested the information be supplied as soon as possible, but no later than November 1, indicating the information was needed to prepare for interest arbitration set for November 12 and 15. Frane testified that she never received a response to this letter from Respondent. The parties stipulated at the hearing that as of November 5, the Respondent had not furnished the requested information to the Union.

Interest arbitration between the parties began on November 12. It was a 2-day process, with the Union and Respondent presenting proposals for an initial contract. By the end of the day, it appeared that the positions of the parties were close. The parties met again on November 15 and an agreement was reached on a collective-bargaining agreement. On November 12, the Union had reiterated its request for information. On November 15, the Respondent provided some, but not all, of the requested information. Frane testified:

> The most noteworthy omission is that nothing pertaining to the nurses was provided. All the licensed practical nurses are in the bargaining unit and all that was given to us was a list of employees, job classifications, dates of hire and I don't recall whether wage rates were included. I believe they were. But none of the information concerning benefit plans.

Frane testified that addresses, telephone numbers, birth dates, and hours worked per week were not provided at that time, but were subsequently provided. Information relating to the licensed practical nurses has still not been provided.

B. *Discussion and Conclusions*

Section 8(d) of the Act sets forth the fundamental requirement that the parties in a collective-bargaining relationship ''meet . . . with respect to . . . the negotiation of an agreement.'' Here, the record evidence clearly establishes that the Union's request to meet and bargain was refused by Respondent. Thus, Respondent offered no testimony or other evidence to refute General Counsel's evidence that by letter dated July 1, and by oral communication of August 2, the Union requested a meeting to negotiate an initial collective-bargaining agreement. In addition, Respondent did not refute Allen's testimony that on August 2, Respondent, through Konig, refused to meet and bargain. Such a refusal is a breach of an employer's duty to bargain in good faith and a violation of Section 8(a)(5) of the Act. *Pony Express Courier Corp*., 311 NLRB 1157 (1993).

In addition to the duty to meet and bargain, an employer is under a duty to supply requested information relevant to collective bargaining. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *Proctor & Gamble Mfg. Co*., 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

Here, the Union requested the names, addresses, telephone numbers, birthdates, wage rates, hours worked per week, job classifications, social security numbers, and dates of hire of employees. In addition, information regarding employee benefit plans, personnel policies, and other terms and conditions of employment was requested by the Union. Although the evidence establishes that the Union requested the information in order to prepare for negotiations, such information is presumptively relevant and no showing of need is necessary. *Hospitality Care Center*, 307 NLRB 1131, 1134 (1992); *Safelite Glass*, 283 NLRB 929, 948 (1987). The fact that the Union later elected to enter into a collective-bargaining agreement without having received all of the requested information does not render the requested information irrelevant. *NLRB v. Yawman & Erbe Mfg. Co*., 187 F.2d 947, 949 (2d Cir. 1951).

As with Respondent's refusal to meet and bargain, the evidence clearly demonstrates that on August 2, Respondent, through Konig, refused to supply the requested information. Moreover, the refusal continued until November 15, when some, but not all of the information was provided. The partial provision of some of the information belies any contention by Respondent that it did not have an obligation to supply the information. Respondent has offered no reason why it does not have an obligation to supply the remainder of the information requested by the Union. By the date of the hearing, some of the information still had not been provided. By its delay in providing some of the information and its refusal to provide the rest of the information, Respondent refused to bargain in good faith in violation of Section 8(a)(5) of the Act. *Postal Service*, 308 NLRB 547 (1992).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by the Employer at its Farmington, Connecticut facility, including licensed practical nurses, certified nurses aides, dietary employees, housekeeping employees, laundry employees, maintenance employees, recreation department employees, the secretary, the admissions coordinator, and clerical employees; but excluding the administrator, the director of nursing services, the assistant director of nursing services and registered nurses, and other supervisors and guards as defined in the Act.

4. Since July 8, 1993, based on Section 9(a) of the Act, the Union has been the certified exclusive collective-bargaining representative of the Respondent's employees in the unit described in paragraph 3 above.

5. Respondent has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act by:

(a) On August 2, 1993, refusing the Union's request to bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

(b) Since August 2, 1993, failing and refusing to supply the Union with information requested on July 1, 1993, which information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

6. The unfair labor practices that Respondent has been engaging in are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

It is recommended that Respondent be ordered to, upon request, bargain collectively in good faith with the Union as

the exclusive collective-bargaining representative of the unit. It is further recommended that Respondent be ordered to supply the Union with all of the information requested by the Union on July 1, 1993, that it has not heretofore supplied.

In addition to the remedies recommended above, the General Counsel requests that Respondent be ordered to reimburse the Board and the Union for all costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this case in light of Respondent's frivolous defense of the allegations of the involved complaint. As can be seen from my findings of fact, Respondent put on no defense to the complaint allegations; yet it forced this proceeding to trial without any reason being given for its refusal to bargain or failure and refusal to furnish information to the Union in a timely fashion or at all. In its answer to the complaint, it even denied the appropriateness of the unit, though that matter was decided upon certification. It appears to me that the Respondent has vindictively set out to ignore the Union's certification and flaunt the Board's processes by its actions as described in the complaint and its actions before the Board with respect to this complaint.

The Board in *Tiidee Products*, 194 NLRB 1234, 1236–1237 (1977), held that, in order to effectuate the policies of the Act and serve the public interest, it had the authority to award costs and expenses in situations when a respondent engages in frivolous litigation. Following *Tiidee*, the Board, in *Heck's Inc*., 215 NLRB 765 (1974), distinguished situations where the issues raised by a respondent were ''debatable'' from those where the issues raised were ''patently frivolous.'' More specifically, the Board in *Heck's* defined ''debatable issues'' as those ''which embraced questions of credibility, as distinguished from those in *Tiidee* which were characterized as 'patently frivolous' and thus clearly meritless on their face.'' Id. at 766. Thus, even though a defense is ultimately found unmeritorious, if resolution of the issue involves credibility, or some other debatable question, then an award of litigation expenses would not be appropriate. See, e.g., *Schuck Component Systems*, 230 NLRB 838 (1977).

In subsequent cases, the Board found that an award of litigation costs is appropriate when the offending party intentionally uses defenses that are meritless on their face in a clear attempt to burden the processes of the Board. *Fetzer Broadcasting Co*., 227 NLRB 1377 (1977), and in cases when there are no significant factual controversies, and when a respondent displays a willful and persistent defiance of the law. *J. P. Stevens & Co*., 239 NLRB 738, 770–772 (1978).

As pointed out by General Counsel the facts in the instant case are very similar to the facts in *Tiidee*. In *Tiidee*, the employer and union entered into an agreement for consent election in connection with the union's effort to organize the employer's production and maintenance employees. A representation election was conducted shortly thereafter and the union prevailed. The employer subsequently filed timely objections, which were investigated by the Regional Office. Based on the investigation, the employer's objections were overruled and the union was certified as the exclusive bargaining representative of the production and maintenance unit. Following the certification, the Union contacted the employer and requested bargaining. This request was denied, as the employer's labor consultant advised the union that the employer would not comply with the certification because ''the Regional Director acted arbitrarily and capriciously by denying the employer his right to due process . . . by making an administrative determination concerning the objections to the election rather than affording it the opportunity for a hearing.'' The administrative law judge in *Tiidee* concluded, inter alia, that the employer violated Section 8(a)(1) and (5) of the Act by engaging in conduct arising out of its refusal to acknowledge and/or abide by the certification of the union. The judge's recommended remedy was based in part on the ''nature and extent'' of the unfair labor practices found, and ''because these violations manifest an attitude of hostility directed toward the very purposes of the Act.'' Id. at 715.

On remand from the court of appeals, the Board addressed the issue of the appropriateness of an award of litigation costs and expenses. See 194 NLRB 1234 (1972), concluding that, given the circumstances of the case, such an award was warranted.

In light of the above authority, and noting the specific facts in *Tiidee*, it is clear from the record that the extraordinary remedy requested in the instant case is appropriate. Clearly, no questions of credibility need to be resolved. The record established that Respondent (as was the case with the employer in *Tiidee*) displayed a willful and persistent defiance of the Regional Director's certification of the Union as the exclusive representative of the employees in the unit. In this regard, Respondent's actions in initially refusing to meet and bargain and in refusing to furnish relevant information demonstrate its complete and utter disregard for the Region's certification of the Union as the exclusive representative of the unit employees. Respondent's further actions of forcing the Union to interest arbitration without having furnished the requested information, and finally, at the 11th hour, agreeing to a contact, underscore its intent to delay as long as possible and to cause the Union to expend resources needlessly.

In addition to the evidence establishing Respondent's ''hostility toward the purposes of the Act,'' the record demonstrated that Respondent frivolously forced the General Counsel and the Union to a hearing in the instant matter without any debatable defenses to the allegations in the complaint. Fully indicative of the Respondent's willful use of meritless defenses to burden the processes of the Board (see *Fetzer*, supra) is its failure to proffer any evidence at the hearing. By failing to bring forth any evidence, Respondent was in effect admitting that it had violated the Act, but it was forcing the Board and the Union to litigate the matter nevertheless. Although I do not question the Respondent's absolute right to due process by availing itself of the Board's decision-making processes, under the circumstances of this case, and in light of the Board's rationale in *Tiidee* and its progeny, the Respondent does not have the right to avail itself of those processes ''free of charge.'' Because the Respondent's conduct has unnecessarily burdened the Board's processes by its insistence on litigating the instant case, an award of litigation costs is not only just and proper, but it is the only way to fully remedy the effects of Respondent's violations of the Act and its subsequent behavior.

Accordingly, it is recommended that Respondent be ordered to pay to the Board and the Union all costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Care Manor of Farmington, Inc., Farmington, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing the Union's request to bargain collectively with it as the exclusive collective-bargaining representative of the unit.

(b) Failing and refusing to supply the Union with information requested on July 1, 1993, which information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit.

(b) Furnish to the Union all of the information requested in its letter of July 1, 1993.

(c) For the reasons set forth in the remedy section of this decision, pay to the Board and the Union all costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this case.

(d) Post at its facility in Farmington, Connecticut, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

In recognition of these rights we notify our employees:

WE WILL NOT refuse to bargain in good faith with the New England Health Care Employees Union, District 1199, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following unit:

> All full-time and regular part-time employees employed by the employer at its Farmington, Connecticut facility, including licensed practical nurses, certified nurses aides, dietary employees, housekeeping employees, laundry employees, maintenance employees, recreation department employees, the secretary, the admissions coordinator, and clerical employees; but excluding the administrator, the director of nursing services, the assistant director of nursing services and registered nurses, and other supervisors and guards as defined in the Act.

WE WILL NOT refuse to provide the Union with information which is necessary for and relevant to its performance of its duties as the exclusive collective-bargaining representative of our employees in the above-described unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL pay to the Board and the Union all costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this proceeding in light of our frivolous defense of the allegations of the Board's complaint.

CARE MANOR OF FARMINGTON, INC.